UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARGONAUT SAVINGS & LOAN ASSOCIATION, ETC.,
Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORP.,
Appellee.

No. 21,364

[April 3, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: MADDEN, Judge, Court of Claims, JERTBERG and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

This is an action by the assignees of a lessor of real property against the Federal Deposit Insurance Corporation (FDIC) as receiver of the lessee, San Francisco National Bank. The District Court entered a summary judgment for the FDIC. We affirm.

The lease was made on July 12, 1963, and calls for rent at $3,000 per month, plus taxes and insurance. On January 22, 1965, the Comptroller of the Currency ordered the Bank closed as insolvent and appointed FDIC receiver. On June 28, 1965, FDIC gave written notice of disaffirmance of the lease, effective July 31, 1965. It paid the rent for the months of February through July, 1965. On December 14, 1965, the present action was filed.

A copy of the lease is attached to the complaint. It provides that, upon the appointment of a receiver for the lessee Bank, the lessor has the following options:

(a) To sue for and collect each installment of rent or other money as it becomes due, or

(b) To re-enter, oust the tenant and relet for the latter's account, the tenant to continue liable, month by month, for deficiencies in rent, or

(c) To terminate the lease, in which event the tenant is to become liable for the difference between the then value of the rent reserved for the balance of the term and the then cash reasonable rental value of the premises for the same period.

The lease also provides for the payment of lessor's attorney fees in the event of successful prosecution of a suit to enforce any provision of the lease.

In the complaint, it is stated that the appellants, "by this Complaint, . . . hereby formally notify the defendant . . . of the termination of the lease as of the date Defendant abandoned the premises [stated elsewhere in the complaint to be July 31, 1965], and hereby make formal claim on the Defendant for the agreed sum of damages [under option (c), above], which Plaintiffs allege to be Six Hundred Ten Thousand Dollars . . . ."

The law of California permits the parties to a lease to agree upon the measure of damages for breach that is here asserted. (Cal.Civ.Code § 3308). But that does not necessarily mean that, under such a lease, the lessor's claim is good against the receiver of an insolvent lessee national bank. This is an action under the National Bank Act, and particularly Section 194 of Title 12, U.S.C., formerly R.S. 5236. The District Court is a court of competent jurisdiction under that section. See 12 U.S.C. § 1819, 28 U.S.C. § 1331. And the question presented is governed by federal law, here, section 194 of 12 U.S.C. *American Surety Co. v. Bethlehem Nat'l Bank,* 1941, 314 U.S. 314, 316.

The paucity of decisions dealing with claims against receivers of insolvent national banks since the great banking crisis of the 1930's is some indication of the success of the measures that were then taken, including the creation of FDIC, itself, to strengthen the banking system. But section 194 has not been amended, and there exists direct authority in support of the judgment here. In *Kennedy v. Boston-Continental Nat'l Bank,* 1 Cir., 1936, 84 F.2d 592, the facts were strikingly similar to the facts of this case, and it was held that the lessor was not entitled to judgment because his claim had not accrued and become unconditionally fixed on or

before the date when the bank was declared insolvent. That is equally true here. The bank was declared insolvent on January 22, 1965; the appellants did nothing to exercise the option given them by the lease until December 14, 1965, nearly 11 months later. The appellants did not have, on January 22, 1965, the claim that they now assert. We think the reasoning in *Kennedy,* and the authorities there cited, fully support the judgment here. See also *Boston-Continental Nat'l Bank v. Wendell Phillips Co.,* 1 Cir., 1936, 84 F.2d 599; *Dinan v. First Nat'l Bank of Detroit,* 6 Cir., 1941, 117 F.2d 459, 461-62.

We do not overlook the argument of appellants that the receiver has no power to disaffirm the lease. But we reject it. There was disaffirmance in *Kennedy, supra,* in *Wendell Phillips Co., supra,* and in *Dinan, supra.* See also *Buhl Land Co. v. Kavanagh.* E.D. Mich. 1954, 131 F. Supp. 136, 143, *aff'd.* 6 Cir., 1955, 223 F.2d 265; *Fidelity Safe Deposit & Trust Co. v. Armstrong,* C.C.S.D. Ohio, 1888, 35 Fed. 567, 569.

AFFIRMED.

Appendix

COMPLAINT ON LEASE

1. This action is deemed to arise under the laws of the United States as contemplated by U.S.C. Title 28 § 1331 in respect to the above-named defendant's being a party hereto, as provided by the Federal Deposit Insurance Act of September 21, 1950, 64 Stat. 873, U.S.C. Title 12 § 1819. The amount in controversy exceeds $10,000, as will more fully appear.

2. On July 12, 1963, one DON C. SILVERTHORNE, as lessor, contracted with and delivered to THE SAN FRANCISCO NATIONAL BANK, as lessee, a certain leasehold at 220 Battery Street, San Francisco, California, for a twenty-five (25) year term to run from August 1, 1963. A copy of such lease is attached hereto as Exhibit A. On July 12, 1963, the aforesaid lessor fully assigned his rights as lessor under the lease to Plaintiffs herein with the full consent and cooperation of the aforesaid lessee. A copy of this Assignment is attached hereto as Exhibit B. For some time prior to June 28, 1965, and ever since, the SAN FRANCISCO NATIONAL BANK has been in receivership, and the defendant has been receiver.

3. On July 31, 1965, the defendant formally disaffirmed the said lease and wrongfully removed from the leasehold premises and ever since has left them vacant and from that date has paid no rental nor performed any other of the obligations of the lessee under the lease although Plaintiff has continually requested that it resume its obligations.

4. Under Item 15 (c) of the lease upon any such default as above-described of the lessee, the lessor is given the option to declare the lease terminated and make demand for, and the lessee is obligated to pay,

by way of liquidated damages, a sum of money, the method of calculation for which is contained under said Item, and the claim for which sum is to be immediately enforceable by suit. By Item 23 the lessor is entitled to request and be awarded a reasonable attorney's fee incurred in prosecution of such a suit. By this Complaint, the Plaintiffs as lessor hereby formally notify the defendant as lessee of the termination of the lease as of the date Defendant abandoned the premises, and hereby make formal claim on the Defendant for the agreed sum of damages, which Plaintiffs allege to be Six Hundred Ten Thousand Dollars ($610,000.00).

5. WHEREFORE, Plaintiffs pray for judgment against Defendant in the sum of Six Hundred Ten Thousand Dollars ($610,000.00), for cost of suit, for reasonable attorneys' fees, and for such other and further relief as the Court may find proper.
DATED: December 9, 1965.

Payne and Levy

By: /s/ Silas O. Payne
Husted, Pinney, Smith & Ogg

LEASE

THIS LEASE, executed in duplicate counterparts on this 12th day of July, 1963, by and between DON C. SILVERTHORNE, as Lessor, and SAN FRANCISCO NATIONAL BANK, a corporation, as Lessee.

3. BASIC RENTAL. The Lessee shall pay as basic rental for the leased premises the sum of Three Thousand Dollars ($3,000.00) per month for each and every

calendar month during the first five (5) years of the term hereof, the sum of Thirty-Five Hundred Dollars ($3,500.00) per month for each and every calendar month during the next five (5) years of the term hereof, and the sum of Four Thousand Dollars ($4,000.00) per month for the final fifteen (15) years of said term, payable monthly in advance.

6. USE OF LEASED PREMISES. The leased premises shall be used by Lessee for the purpose of carrying on a *general banking, trust and safe deposit business,* and for no other purpose without Lessor's prior consent thereto in writing.

15. DEFAULT AND REMEDIES. If default shall be made by Lessee in the payment when due of any rental or other moneys due hereunder and such default shall continue for ten (10) days after the due date for such payment; or if Lessee shall otherwise be in default in the performance of any of the terms, covenants or conditions herein contained and such default shall continue after the expiration of thirty (30) days following delivery to Lessee by Lessor of written notice to cure such default; or if Lessee's interest herein or any part threof be assigned or transferred, either voluntarily or by operation of law, without permission of Lessor when such permission is required by the term of this lease, whether by judgment, execution, death or any other means, or if Lessee shall file any petition or institute any proceedings under any bankruptcy act, state or federal, or if any such petition or proceeding be filed or be instituted or taken against Lessee; or if any receiver of the business or of the property or assets of Lessee shall be appointed by any court, except a receiver appointed at the instance or request of Lessor; or if Lessee shall make a general or any assignment for the benefit

of its creditors; or if Lessee shall abandon or vacate the premises; or if Lessee shall otherwise, in any amount whatever, become unable to pay the rent herein specified or to perform any of the terms, covenants, or conditions herein by it to be kept or performed, then in any of such events Lessor shall have the option either:

(c) To terminate this lease, in which event Lessee agrees immediately to surrender possession of the premises and to pay to Lessor as the amount of damage sustained by Lessor by reason of Lessee's breach of this lease (Lessee agreeing that it would be impractical or extremely difficult to fix the actual damage) a sum of money equal to the amount, if any, by which the then cash rental value of the rent reserved hereunder for the balance of the term of this lease exceeds the then cash reasonable rental value of the premises for the balance of the term at the time of such termination, the claim for which sum shall be immediately enforceable by Lessor against Lessee by suit, and shall be proveable in any proceedings for the liquidation or reorganization of Lessee.

The foregoing remedies of Lessor shall not be exclusive, but shall be cumulative and in addition to all remedies now or hereafter allowed by law or elsewhere provided for.

AFFIDAVIT

STATE OF CALIFORNIA)
CITY AND COUNTY OF) ss.
SAN FRANCISCO)

SILAS O. PAYNE, being first duly sworn, deposes and says:

That he is an attorney-at-law with offices at 650 California Street, San Francisco, California.

That the Plaintiffs did not receive any loan payments from the said DON C. SILVERTHORNE or from the said SAN FRANCISCO NATIONAL BANK on or after December 1, 1964 and the undersigned therefore states on information and belief that the said SAN FRANCISCO NATIONAL BANK did not pay the rent payments due December 1, 1964 and subsequently falling due.

That the Plaintiffs received no payments from any source on or after December 1, 1964 except as follows: The Defendant made payments of ONE THOUSAND FIVE HUNDRED AND NO/100 ($1,500.00) DOLLARS each to the Plaintiffs on the dates indicated: March 2, 1965; March 9, 1965; April 5, 1965; April 30, 1965; June 2, 1965 and June 30, 1965.

That the payment record is attached hereto and made a part hereof.

/s/ SILAS O. PAYNE

Subscribed and sworn to before me
this 20th day of May, 1966.
/s/ ELAINE P. THUESEN
Notary Public

JUDGMENT

A motion by the defendant above named for summary judgment in its favor dismissing the complaint, the action and the cause, having been duly brought on to be heard, and the court having made its findings of fact and its conclusions of law granting said motion and directing that judgment be entered herein in favor of defendant dismissing the action it is hereby

ORDERED, ADJUDGED AND DECREED that defendant have judgment in its favor herein, and that the complaint, the action and the cause herein be and the same hereby are dismissed with prejudice.

Dated: July 11, 1966.

/s/ WM. C. MATHES
Senior U.S. District Judge

CALIFORNIA CIVIL CODE SEC. 3308

The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, or the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.

The rights of the lessor under such agreement shall be cumulative to all other rights or remedies now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse there-

after to any other remedy for rent or charges equivalent to rental or damages for breach of the covenant to pay such rent or charges accruing subsequent to the time of such termination. The parties to such lease may further agree therein that unless the remedy provided by this section is exercised by the lessor within a specified time the right thereto shall be barred. (Stat. 1937, p. 1494)